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No. 89-1217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES P. LEHNERT, *et al.*,
Petitioners,

v.

THE FERRIS FACULTY
ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE PETITIONERS

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July 26, 1990

QUESTIONS PRESENTED

Do the first and fourteenth amendments to the United States Constitution permit a public employer to compel objecting nonunion public employees to contribute, as a condition of their employment, to the costs of the following activities engaged in by their exclusive bargaining representative and its state and national affiliates:

a) bargaining, litigation, and other activities, including political and ideological activities, on behalf of persons in other bargaining units, other states, and different professions, and retirees;

b) lobbying at state and federal levels on measures not for ratification of, or authorization or appropriation of funds for, the bargaining agreement covering the employees' bargaining unit;

c) electoral politics, including campaigns concerning ballot issues;

d) public relations activities;

e) non-bargaining activities related only generally to the employees' profession;

f) meetings of the affiliates that primarily serve political and ideological purposes; and,

g) threatening and preparing for illegal strikes?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceedings below were:

Petitioners: Elmer G. Junker, James E. Lindsey, Sam C. Peticolas, John R. Schauble, and Theodore D. Speerman.

Respondents: Michigan Education Association; National Education Association of the United States; the Board of Control of Ferris State College; Earl D. Gabriel, Robert P. Gerholz, Fran Harris, Delbert D. Long, Robert C. Redman, Thomas P. Scholler, Patricia M. Short, and Steven L. Thomas, members of the Board of Control of Ferris State College, in their official capacities; Robert L. Ewigleben, President of Ferris State College, in his official capacity; S. Eugene Bychinsky, Vice President, Personnel, of Ferris State College, in his official capacity.

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OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Sixth Circuit are reported at 881 F.2d 1388 (Petition Appendix ("P.A.") 1a); its unreported judgment is reprinted in the Joint Appendix ("J.A.") at 129. The opinion and judgment of the United States District Court for the Western District of Michigan are reported at 643 F. Supp. 1306 (P.A. 18a); its opinion denying a motion for new trial and to alter or amend judgment is reported at 685 F. Supp. 164 (P.A. 81a).[1]

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[1] Earlier opinions of the district court not relevant to the questions presented are reported at 556 F. Supp. 309 (denying motions to dismiss and for abstention and summary judgment) and 556 F. Supp. 316 (denying motion for protective order).

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1989. On September 19, 1989, petitioners were granted leave to file a petition for rehearing one day out of time, *i.e.*, on August 29, 1989, when the court of appeals received it. P.A. 89a. Rehearing was denied on November 7, 1989. P.A. 90a. A timely petition for certiorari was filed on January 30, 1990. 58 U.S.L.W. 3505; *see Bowman v. Loperena*, 311 U.S. 262, 266 (1940). This Court granted the writ on June 11, 1990. 58 U.S.L.W. 3785. The jurisdiction of the Court rests on 28 U.S.C.A. § 1254(1) (West Supp. 1990).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the United States Constitution states in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 1 of the fourteenth amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), says in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The state statutes involved are the Michigan Public Employment Relations Act ("PERA"), Mich. Comp. Laws §§ 423.201-.216 (1979), and Michigan Compiled Laws § 408.477 (1979).

Their pertinent provisions are reprinted in the Petition Appendix at, respectively, 92a and 95a.

STATEMENT OF THE CASE

Petitioners ("the nonmembers") are six present or former faculty members employed by Ferris State College ("Ferris"), a four-year public institution of higher learning in Michigan. Although not union members, they are or were in a bargaining unit, consisting only of faculty at Ferris, represented exclusively for purposes of collective bargaining by a union, the Ferris Faculty Association ("FFA"). P.A. 1a-2a. During fiscal 1981-82 there was an average of 502 full-time equivalent employees, including five of the nonmembers, in the unit. P.A. 24a.

The FFA, which represents only the one unit, is affiliated with the Michigan ("MEA") and National ("NEA") Education Associations. Under an "agency shop" provision in the bargaining agreements in effect since 1981, as authorized by the PERA, Mich. Comp. Laws § 423.210 (P.A. 92a-93a), and Michigan Compiled Laws § 408.477 (P.A. 95a), Ferris automatically deducted from nonmembers' pay a "service fee" equal to the dues of members of the FFA, MEA, and NEA ("the unions"), "less any amounts not permitted by law." P.A. 19a-23a & n.3.

The MEA and NEA have many other local affiliates which represent employees elsewhere in Michigan and other states, including states where public-sector bargaining is not permitted. Some locals represent faculty at other higher education institutions, but most represent teachers in public elementary, intermediate, or high schools ("K-12"). Others represent faculty or teachers in private or parochial education, and yet others represent educational support personnel (*e.g.*, school secretaries and nurses). In addition, services are provided to retired members. *E.g.*, J.A. 29, 86; 144-46, 150 (J.A. 51-52); 232 (J.A.

24-26); 271 (J.A. 27-28).[2] The MEA and NEA are "highly politicized organization[s], active in causes both related and unrelated to collective bargaining, contract administration and grievance adjustment." P.A. 32a, 39a.

On the authority of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the nonmembers objected to the exaction of service fees for any purpose other than the performance of the FFA's duties as exclusive representative of the Ferris unit. P.A. 25a. They brought this civil rights action under, *inter alia*, 42 U.S.C. § 1983, claiming that the freedoms of speech, thought, conscience, assembly, petition, and association secured to them by the first and fourteenth amendments are violated to the extent that the fee includes the costs of such other activities. Federal jurisdiction is based on 28 U.S.C. §§ 1331 and 1343 (1982). In addition to the unions, the governing Board of Control of Ferris, its members and two officers of Ferris, in their official capacities, were named as defendants. P.A. 18a-20a.[3]

In pre-trial proceedings, the parties agreed that the issue of which union expenditures constitutionally are chargeable to objecting nonmembers would be tried only with regard to the unions' fiscal year 1981-82. A portion of the fees demanded of the nonmembers for that year was put in escrow. P.A. 23a-24a. After a twelve-day bench trial at which the court heard twelve witnesses and admitted ninety exhibits, judgment was entered for the nonmembers. P.A. 19a, 77a-78a.

The district court held that certain union expenditures were chargeable, others were not as a matter of law, and yet others were not because the unions did not meet their burden of proof. P.A. 44a-66a. The judgment required restitution of most of the

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[2] Joint Appendix references which include parentheticals are to trial exhibits and the pages at which they were offered and admitted.

[3] Pursuant to stipulation and order, only injunctive relief was sought against the nonunion defendants. P.A. 19a.

nonmembers' escrowed funds, but ordered that the unions were entitled to specified amounts for 1981-82. P.A. 77a-78a.[4]

A motion by the unions for partial new trial and to alter or amend the judgment was denied. P.A. 87a. They noticed appeal, and the nonmembers filed a timely cross-appeal. J.A. 4. After a partial settlement agreement, the unions dismissed their appeal; the cross-appeal was limited to the contention that the district court erred in concluding that the costs of certain activities were constitutionally chargeable to the nonmembers. P.A. 3a. The challenged activities included: (1) activities on behalf of persons not employed in the FFA's bargaining unit; (2) lobbying; (3) electoral politics; (4) public relations; (5) professional/educational activities; (6) conventions of the MEA and NEA and meetings of another level of the unions' structure, the 13E Coordinating Council; and (7) preparations for illegal strikes. P.A. 5a-12a.

The court of appeals affirmed. P.A. 13a. Judge Merritt concurred that the costs of the MEA and NEA conventions and 13E meetings are constitutionally chargeable. However, he vigorously dissented with regard to the other disputed activities. P.A. 13a-17a. Because less than a majority of all active judges of the court of appeals favored a suggestion of en banc consideration, a petition for rehearing was referred to the original panel. It denied rehearing. P.A. 90a.

SUMMARY OF THE ARGUMENT

In its compulsory dues and patronage cases, the Court has held that infringements on the freedoms not to speak, associate, and petition government can be permitted only if narrowly tailored to serve a compelling state interest. The only governmental interest that agency-shop arrangements serve is to

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[4] The judgment also enjoined deduction of fees until further order, because the unions' collection procedures were unconstitutional under *Teachers Local 1 v. Hudson*, 475 U. S. 292 (1986). P.A. 66a-75a, 78a.

reimburse an exclusive representative of the employees in a bargaining unit for costs incurred in performing its statutory duties of dealing with their employer on labor-management issues. Objecting nonunion public employees cannot be charged for activities which add significantly to the serious infringement on their first-amendment rights inherent in coerced support of even bargaining and contract administration with their employer, unless the activities are necessary to the performance of those statutory duties.

None of the activities at issue here meets that test. All significantly add to the infringement on the nonmembers' first-amendment rights. Litigation and other activities on behalf of persons not in the nonmembers' unit, even if bargaining-related, are not essential to the union's performance of its statutory duties as *the nonmembers'* bargaining agent. Lobbying, ballot campaigns and other political activities (including meetings of the bargaining agent's affiliates), public relations, and non-bargaining activities related only generally to the employees' profession are not *necessary* to bargaining and contract administration anywhere and, in most cases here, did not directly concern the nonmembers' bargaining unit. The final activity at issue, threatening and preparing for a strike, was the only one directly related to that unit, but it served *no* conceivable state interest, because public-sector strikes are illegal in Michigan.

ARGUMENT

I. CHARGEABLE COSTS MUST DIRECTLY SERVE A COMPELLING STATE INTEREST TO MINIMIZE INFRINGEMENT ON FIRST-AMENDMENT RIGHTS

Abood, 431 U.S. at 232, held that a public-sector agency shop is constitutionally valid only "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." It also held that dissenting nonmembers "may constitutionally prevent the Union's spending

a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." The first amendment prohibits a union from spending coerced fees for political and "other ideological causes not germane to its duties as collective-bargaining representative." *Id.* at 234-36.

Because of the case's posture, *Abood* did not further define what, and where, union activities can constitutionally be financed from dissenters' service fees. It did suggest that the answer to those "constitutional questions" depends on the extent to which "activities fall outside the Union's duties as exclusive representative or involve constitutionally protected rights of association." *Id.* at 236-37 & n.33.

The Court has not addressed these issues more specifically in the context of a public-sector agency shop. However, chargeable costs must be defined narrowly in this context because, "first, * * * *any* withholding of financial support for a public-sector union is within the protection of the First Amendment; and, second, * * * the State * * * bear[s] the burden of proving that any union dues or fees that it requires of nonunion employees are needed to serve paramount governmental interests." *Id.* at 255 (Powell, J., concurring in the judgment). Those principles are implicit in the opinion of the Court in *Abood* and were reiterated explicitly in later related decisions, including two last Term.

Abood held that compelling "contributions for political purposes works * * * an infringement of * * * constitutional rights." *Id.* at 234. It also recognized that to "compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests," even when the union is engaged in bargaining and contract administration. *Id.* at 222. As Justice Powell said, "compelling a government employee to give financial support to a union in the public sector—regardless of the uses to which the union puts the contribution—impinges *seriously* upon interests in free speech and

association protected by the First Amendment." *Id.* at 255 (emphasis added).

Justice Powell's formulation of the principle was adopted in *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984) (emphasis added): "by allowing the union shop at all, we have already countenanced a *significant* impingement on First Amendment rights." It was repeated twice more in *Teachers Local 1 v. Hudson*, 475 U.S. 292, 301 & n.8, 307 n.20 (1986), a public-sector case which cited *Ellis* and the opinions of both the Court and Justice Powell in *Abood* for the proposition.

Abood also established that first-amendment strict scrutiny is required in deciding whether union activities may be charged to objecting nonmembers. It held that the public-sector agency shop is constitutional insofar as the service fee is used for "collective bargaining, contract administration, and grievance adjustment," despite "the impingement upon associational freedom," because it is supported by "the same *important* government interests recognized in" *Railway Employes' Department v. Hanson*, 351 U.S 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961). *Abood*, 431 U.S. at 225-26 (emphasis added).

Moreover, in holding that a union may not constitutionally expend compulsory fees for "ideological activities unrelated to collective bargaining," *Abood*, 431 U.S. at 232-36, relied on decisions prohibiting government from infringing on free association or requiring relinquishment of first-amendment rights as a condition of public employment unless a vital governmental interest is served directly and narrowly. The case cited most often there was *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion). Again, Justice Powell explicitly stated the controlling principle established by those cases and, thus, implicit in the majority opinion in *Abood*: "even in public employment, 'a significant impairment of First Amendment rights must survive

exacting scrutiny.'" *Abood*, 431 U.S. at 259 (citing *Elrod*, 427 U.S. at 362 (plurality opinion), 381 (Powell, J., dissenting)).[5]

That rule was later applied in *Ellis*. While based partly on construction of § 2, Eleventh of the Railway Labor Act ("RLA"), 45 U.S.C. § 152, Eleventh (1982), *Ellis* has first-amendment underpinnings. *See Roberts v. United States Jaycees*, 468 U.S. 609, 637-38 (1984) (O'Connor, J., concurring). A narrow test for what is chargeable to objecting nonmembers was announced in *Ellis*, 466 U.S. at 444-48, "to avoid the constitutional difficulty" raised by the argument that the disputed expenditures violated the first amendment.

And, in deciding whether particular union expenses are constitutionally chargeable, *Ellis*, 466 U.S. at 455-56 (emphasis added), said that the issue is whether they "involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless *adequately* supported by a *governmental* interest." *Ellis* thus applied strict scrutiny to all disputed activities which "have direct communicative content and involve the expression of ideas" (conventions, publications, organizing, and litigation), determining whether they directly served the governmental interest underlying § 2, Eleventh, *i.e.*, "to require all members of a bargaining unit to pay their fair share of the costs of performing the function of exclusive bargaining agent." *Id.* at 446, 456.

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[5] Although Justice Powell believed that patronage serves a compelling state interest, he agreed with the majority in *Elrod* and *Branti v. Finkel*, 445 U.S. 507, 527-28 (1980) (Powell, J., dissenting), that it, like state coerced support of unions, is unconstitutional unless that exacting test is met. Lower courts also have concluded that "[i]mplicit in Justice Stewart's opinion in *Abood* is the recognition that, when the government impinges on an individual's associational rights—either by prohibiting or compelling association—such action cannot be sustained unless it is justified by a compelling governmental interest." *Galda v. Bloustein*, 686 F.2d 159, 164 (3d Cir. 1982); *accord, e.g., Gibson v. Florida Bar*, 798 F.2d 1564, 1569 (11th Cir. 1986).

The conventions and portions of publications held chargeable met the stricter part of the *Ellis* test that to be chargeable costs must be "necessarily * * * incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues," *id.* at 448. The Court found that conventions "such as those at issue here are * * * *essential* to the union's discharge of its duties as bargaining agent"; and, that the "union *must* have a channel for communicating with the employees" about "those activities it can charge them for doing." *Id.* at 448-51 (emphasis added).

The Ninth Circuit had ruled that costs of organizing and all litigation met the less exacting part of the *Ellis* test, *i.e.*, are "reasonably incurred for the purpose of performing" statutory duties in the objectors' bargaining unit, since those activities "strengthened the union as a whole" and "ultimately benefited * * * collective-bargaining efforts" in that unit. *Id.* at 441, 448. Nonetheless, because organizing and litigation outside the unit are not necessarily incurred for bargaining in it, this Court held them not chargeable. *Id.* at 451-53. The only activity which the Court found chargeable under the broader "reasonably incurred" test was union social activities which had no inherent communicative content. *Id.* at 449-50, 456.

The rights at stake here are wholly constitutional, not partly statutory as in *Ellis*, because the Michigan agency-shop statute, Mich. Comp. Laws § 423.210(10)(1)(c), (2) (P.A. 92a-93a), "'sanctions the use of nonunion members' fees for purposes other than collective bargaining.'" *Abood*, 431 U.S. at 232 (quoting *Abood v. Detroit Bd. of Educ.*, 60 Mich. App. 92, 99, 230 N.W.2d 322, 326, *appeal denied*, 395 Mich. 755 (1975), *vacated*, 431 U.S. 209 (1977)). However, as said in *Abood*, 431 U.S. at 240, "that difference surely could not justify any lesser relief in this case." Also, this is a public-sector case, but the "differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232. Thus, although "in the public sector the line may be somewhat hazier," *id.* at 236, compulsion is prohibited by the first amendment here, as in *Ellis*, unless a disputed activity directly

advances the governmental interest that the agency shop is thought to serve.

Any prior doubt that normal first-amendment strict scrutiny is necessary in defining chargeable costs under a public-sector agency shop was dispelled by *Hudson*. Because *Hudson* concerned the procedures for collecting service fees, it did not define "'the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters.'" *Hudson*, 475 U.S. at 294 (quoting *Ellis*, 466 U.S. at 447), 304 n.13. Nonetheless, *Hudson* has significance in drawing that line.

In *Hudson*, 475 U.S. at 302-03 & n.11 (footnote omitted), the Court relied on *Roberts*, 468 U.S. at 623 (which cited *Abood*), *Elrod*, 427 U.S. at 363, and earlier statements of the strict-scrutiny test for the conclusion that,

> although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure [for determining chargeable costs] be carefully tailored to minimize the infringement.

There is far greater reason to tailor carefully and apply narrowly the legal standard for determining chargeable costs, because the legal standard is even more important to that determination than the procedure by which the standard is applied.

Although the panel majority below recognized that the *Ellis* test applies here, P.A. 4a, it ignored *Hudson*'s command of strict scrutiny. Consequently, as Judge Merritt pointed out, the majority "significantly expand[ed] *Ellis* without justification and without serious attention to the protections of the First Amendment," P.A. 14a (dissenting), as two decisions in the 1989 Term demonstrate.

First, *Keller v. State Bar*, 110 S. Ct. 2228, 2236 (1990) (emphasis added), found that "useful guidelines for determining permissible expenditures" in the context of first-amendment challenges to compulsory bar dues are provided by the *Ellis* test that chargeable expenditures must be "necessarily or reasonably incurred" for "the purpose for which compelled association was justified" by "*vital* national interests." *Keller* also interpreted those guidelines narrowly. By statute, "the State Bar was authorized to '"aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice."'" *Id.* (quoting *Keller v. State Bar*, 47 Cal. 3d 1152, 1169, 767 P.2d 1020, 1030, 255 Cal. Rptr. 542, 552 (1989), *rev'd*, 110 S. Ct. 2228 (1990)). A simple comparison "might suggest that there is little difference between" that language and the "guiding standard" derived from *Ellis*. "But there is a difference," this Court held, which the California court erroneously overlooked when it ruled that the Bar "may use the dues for any purpose within its broad statutory authority." *Id.* at 2231, 2236. That "difference" is that objectors' dues constitutionally may be used only when the Bar is "acting *essentially*" in the state-created role which justifies compulsory bar dues, *i.e.*, in regulating the legal profession. *Id.* at 2236-37 (emphasis added).

Second, *Rutan v. Republican Party*, 58 U.S.L.W. 4872, 4875-76 (U.S. June 21, 1990) (No. 88-1872), affirmed in the strongest terms yet the need for strict scrutiny in reviewing practices which condition public employment on support for private organizations engaged in ideological activity: "The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." Unless such practices "are *narrowly tailored* to further *vital government* interests, we must conclude that they impermissibly encroach on First Amendment freedoms." *Id.* at 4875 (emphasis added); *compare Hudson*, 431 U.S. at 302-03.

II. MICHIGAN'S ONLY COMPELLING INTEREST IN THE AGENCY SHOP IS REIMBURSEMENT OF THE COSTS OF PROVIDING STATUTORY REPRESENTATION TO THE NONMEMBERS' BARGAINING UNIT

In identifying an interest which can justify coerced speech and association, "care must be taken not to confuse the interest of partisan organizations with governmental interests." *Elrod*, 427 U.S. at 362. The "governmental interests advanced by the agency-shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal labor law." *Abood*, 431 U.S. at 224. Those interests, as repeatedly identified by the Court, are "to eliminate free riders—employees *in the bargaining unit* on whose behalf the union was *obliged* to perform *its statutory functions*, but who refused to contribute to the cost *thereof*." *Ellis*, 466 U.S. at 447 (emphasis added); *accord*, *e.g.*, *Abood*, 431 U.S. at 221-22, 224; *Street*, 367 U.S. at 764 & n.15.

Indeed, *Abood* noted that Michigan's public-sector agency-shop statute "was specifically designed to authorize agency shops in order that 'employees in the bargaining unit share fairly in the financial support of *their* exclusive *bargaining* representative. . . .' " 431 U.S. at 224 (quoting Mich. Comp. Laws § 423.210(2) (P.A.92a)) (emphasis added). It was that limited interest alone which led the Court to hold that *Hanson* and *Street* were conclusive as to the constitutionality of the statute "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." *Id.* at 223-32.

Abood's use of that particular phrase to describe "the costs of exclusive representation," *id.* at 229, was not casual. Under Michigan's PERA, a union is "the exclusive representative of all the public employees *in [an appropriate] unit for the purposes of collective bargaining* in respect to rates of pay, wages, hours of employment or other conditions of employment * * * " and must be permitted to participate in the adjustment of employee grievances. Mich. Comp. Laws § 423.211 (P.A. 93a) (emphasis added). Collective bargaining is defined as

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement reached * * * .

Mich. Comp. Laws § 423.215 (P.A. 93a-94a).

Thus, *the only functions imposed by the statute upon an exclusive representative are to engage in collective bargaining, contract administration, and grievance adjustment*, as the MEA's Director of Legal Services testified. J.A. 24. As under the federal labor statutes, a union is exclusive representative, and has a duty of fair representation, only for services that "gro[w] out of the collective bargaining relationship," not all "services that are employment-related," *National Treasury Employees Union v. FLRA*, 800 F.2d 1165, 1168-71 (D.C. Cir. 1986) (opinion by Bork, J.). And, by definition, *there is no statutory obligation to perform any functions on behalf of, and no duty of fair representation owed to, anyone except the employees in the one unit. See Ellis*, 466 U.S. at 451-53; *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 375-76 & n.22 (1984).

Necessarily then, under the first amendment, as under the RLA as construed to avoid constitutional difficulty, the test is not whether a disputed activity relates to bargaining somewhere or somehow impacts on the employees' bargaining unit. Rather, it

> must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative *of the employees in dealing with the employer on labor-management issues*. Under this standard, objecting employees may be compelled to pay their fair share of * * * the direct costs of negotiating and administering *a* collective-bargaining contract and of settling grievances and disputes, [and] the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union *as exclusive representative of the employees in the bargaining unit*.

Ellis, 466 U.S. at 448 (emphasis added); *accord Communications Workers v. Beck*, 487 U.S. 735, 762-63 (1988).

Under that test, applied strictly as the first amendment requires, the proper question with regard to every activity disputed here is, as Judge Merritt put it, whether it was "directly" or "closely" related to bargaining, contract administration, and grievance adjustment by the FFA on behalf of the faculty at Ferris. P.A. 13a-16a (dissenting).[6] Indeed, before this case, that was the Sixth Circuit's standard: the union "may collect only for those expenses *affirmatively* related to *the* bargaining agreement because these constitute the only expenditures that, consistent with the First and Fourteenth Amendments under *Abood* and *Hudson*, the union may collect to prevent non-members' 'free riding.'" *Tierney v. City of Toledo*, 824 F.2d 1497, 1505 (6th Cir. 1987) (emphasis altered).[7]

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[6] This is the only principled way to draw the line, because, as one comment on *Abood* pointed out, "[a]lmost any expenditure made by a union is connected in some way to its duties as collective bargaining representative." The article concluded that, to reconcile *Abood* with *Street*, the line must be drawn so that only "expenditures incident to the negotiation and administration of [the] specific contract" are chargeable. *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 196-97 (1977). A critic of *Ellis* concurs that its "test inquires whether a particular expenditure was authorized by a policy * * * of requiring nonmember employee support only for specific collective bargaining services rendered on behalf of the payor or her unit." Friesen, *The Costs of "Fee Speech"—Restrictions on the Use of Union Dues to Fund New Organizing*, 15 Hastings Const. L.Q. 603, 624 (1988).

[7] The line was also drawn strictly in *Hudson v. Teachers Local 1*, 743 F.2d 1187, 1193 (7th Cir. 1984) (emphasis added), *aff'd on other grounds*, 475 U.S. 292 (1986): **[note continued over]**

III. ACTIVITIES OUTSIDE THE STATUTORY DUTIES OF THE NONMEMBERS' EXCLUSIVE REPRESENTATIVE WERE ERRONEOUSLY HELD CHARGEABLE

The courts below clearly applied a much broader standard of chargeability than permitted by first-amendment strict scrutiny and the limited state interest that justifies the agency shop. Under their rulings, in calculating a service fee a public-sector union may ignore the bargaining unit and the statutory definition of its duties as a nonmember's exclusive representative; the union may charge nonmembers for activities, even if political or ideological, of it and its affiliates as long as those activities appear to advance some employment-related interest of employees (or former employees) they represent somewhere. P.A. 5a-12a, 51a-57a. Because unions presumably intend everything they do to advance some employment-related interest of some employee they represent, the practical effect is to give *carte blanche* to unions in collecting compulsory fees from public employees.

As in *Ellis*, 466 U.S. at 448-57, in assessing where the lower courts erred, the correct standard must be applied to each disputed type of activity. In conducting that review, this Court should examine anew the entire pertinent record, because the ultimate issue as to each category—whether that type of speech and association may be compelled—is a question of law under the first amendment. *Compare Rankin v. McPherson*, 483 U.S. 378,

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> the state cannot deprive an individual of his freedom of association by forcing him to support a union, except in accordance with procedures that reasonably assure that the deprivation will go *no further than is necessary* to prevent the individual from taking a free ride on an entity that * * * is providing *services to him as his collective bargaining representative*.

This Court and one judge on the Seventh Circuit panel found it unnecessary there to address what activities are constitutionally nonchargeable. *Hudson*, 475 U.S. at 304 n.13; *id.*, 743 F.2d at 1197-98 (Flaum, J., concurring in the result).

384-86 & n.9 (1987), *with Abood*, 431 U.S. at 236-37 & n.33; *see Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 173-76 & n.5 (1976) (independently determining what constitutes "negotiating").

A. ACTIVITIES ON BEHALF OF PERSONS NOT IN THE NONMEMBERS' BARGAINING UNIT

One of the "direct expenditures" of the MEA that the district court held chargeable was the cost of 81.6% of the *Teacher's Voice*, the MEA's primary publication. The "chargeable" portion included all 779 column inches categorized as "Collective Bargaining," 1,816 of the 1,895.5 categorized as "Lobbying," 79 of the 97 categorized as "Litigation," and 627 of the 637.5 categorized as "Administrative." P.A. 63a, 80a.

The analysis of the contents of the *Teacher's Voice* used by the court and the actual articles show that *none* listed as "Collective Bargaining" and "Litigation" concern Ferris; indeed, few concern public higher education at all, several deal with support personnel, two discuss litigation related to organizing in the private-sector, and one is about the air traffic controllers' dispute with the Reagan Administration. J.A. 198-204, 229-30 (J.A. 24-26), & Pl.Ex. 612 (J.A. 27-28), as referenced therein (*e.g.*, J.A. 271).[8] Also, many articles found chargeable in the "Lobbying," "Litigation," and "Administrative" categories, some of which report on organizing, are about retirees, support personnel, or

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[8] The unions agreed that column inches and titles of articles in the *Teacher's Voice* were accurately listed in the content analysis (J.A. 197 (J.A. 24-26)); the notations "NC" in the analysis are the MEA's legal director's indication of articles conceded to be nonchargeable. J.A. 19-21, 24-27. Plaintiffs' Exhibit 612, Volume 59 of the *Teacher's Voice*, was reproduced in the Sixth Circuit as Joint Appendix Volume IV; for the convenience of the Court, additional copies have been lodged with the Clerk's office.

school nurses. J.A. 204-17, 229-36 (J.A. 24-26), & Pl.Ex. 612 as referenced therein.[9]

Similarly, several of the NEA "program expenditures" held chargeable were earmarked for states other than Michigan (including states in which collective bargaining was not authorized), for support personnel, or for retirees: Affiliate Services' program 5.1 was for bargaining projects in Alabama, Alaska, Colorado, Nevada, North Dakota, South Dakota, Vermont, West Virginia, and Wyoming;[10] Research programs 2.4 and 2.5 consisted of research for school support personnel and on retirement issues (including the preparation of legislative testimony); and Research program 5.2 was for studies on "school finance" in Idaho, Vermont, Delaware, Maryland, New Hampshire, Maine, Oregon, and Arizona.[11] The other NEA programs held chargeable possibly related to bargaining somewhere, but the unions did not show that they related to bargaining at Ferris: Affiliate Services' programs 5.2 and 5.3, and Research programs 2.1, 2.2, 2.3, 2.6, and 5.1. P.A. 65a-66a; J.A. 293-300 (J.A. 37-39).

The court of appeals' panel upheld charging the nonmembers for those activities on behalf of persons not employed in their

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9 "Lobbying" articles about retirement legislation, and "Administrative" articles about support personnel, school nurses, and organizing contain more column inches than the district court held nonchargeable in each category. Thus, it must have considered them chargeable. The court also apparently treated articles about retirement-related litigation as chargeable, because the number of inches held nonchargeable under "Litigation" equals the number so characterized by the MEA, and none of the articles marked "NC" concern retirement. *Compare* P.A. 80a *with* J.A. 204-17, 229-36.

10 Collective bargaining was not authorized for educational employees in Alabama and Wyoming. Ala. Code §§ 16-8-10, 16-11-18 (1975) ("consultation" only); *Retail Clerks Local 187 v. University of Wyo.*, 531 P.2d 884 (Wyo. 1975).

11 Collective bargaining was prohibited for educational employees in Arizona. *Communications Workers v. Arizona Bd. of Regents*, 17 Ariz. App. 398, 498 P.2d 472 (1972); 1974 Op. Ariz. Atty. Gen. 31.

bargaining unit (or activities not shown to be related to it). The majority interpreted *Ellis* as holding that, if expenditures are of a type that would be chargeable to someone, they are chargeable to dissenting employees "even if the chargeable activities * * * were *unrelated* to the specific bargaining unit of the dissenting employees." P.A. 10a-11a. They did not quote language so holding in *Ellis*, because *Ellis* actually held precisely the opposite, as Judge Merritt recognized. P.A. 13a-16a (dissenting). As discussed *supra* pp. 13-15, the overall holding of *Ellis*, 466 U.S. at 448, is that compulsory fees can only include costs which an exclusive representative, and its affiliates, incur in performing its statutory duties as bargaining agent for the dissenters' unit in dealing with their employer on labor-management issues.

Moreover, in considering two expense categories challenged in *Ellis*, organizing and litigation, the Court explicitly and emphatically used a bargaining-unit limit. Organizing expenses are not chargeable, because they "are spent on employees outside the collective-bargaining unit already represented." *Id.* at 452.[12] And, "unless the[ir] bargaining unit is directly concerned, objecting employees need not share the costs of the union's [litigation]." *Id.* at 453. The panel majority ignored those holdings, citing instead the rulings of *Ellis* as to the union's convention and publication. *See* P.A. 10a-11a. However, those rulings also are fully consistent with a bargaining-unit standard.

The convention was chargeable in *Ellis*, because it was "essential to the union's discharge of its duties as bargaining agent" *for the dissenters' unit*. *Ellis*, 466 U.S. at 448-49.[13] And,

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12 That *Ellis*, 466 U.S. at 452 n.13, also disallowed organizing within the unit on another ground does not vitiate the importance of its *rationale* for holding that organizing outside the unit is not chargeable.

13 In *Ellis*, the national union was itself the exclusive representative and negotiated, executed, and administered the bargaining agreement covering the dissenting employees. Brief for Respondents at 1, 25-27, *Ellis* (No. 82-1150); *see Ellis v. Railway Clerks*, 685 F.2d 1065, 1073 (9th Cir. 1982), *aff'd in part, rev'd*

[noted continued over]

despite the panel majority's claim, *Ellis* did not hold that the costs of a union publication are chargeable "even if the chargeable activities reported on were *unrelated* to the specific bargaining unit of the dissenting employees," P.A. 10a. *Ellis*, 466 U.S. at 451 & n.11 (emphasis added), held only that the union could "charge objecting employees for reporting to them about those activities it can charge *them* for doing," *not* for reporting about activities for which it "cannot spend dissenters' funds," including organizing and litigation not directly concerning their bargaining unit. In short, publications are subject to the bargaining-unit limitation.

The district court viewed the *Ellis* bargaining-unit standard as only statutory. P.A. 55a-56a. However, it is required by first-amendment strict scrutiny.

The only interference with first-amendment rights that necessarily inheres in the agency shop is that it forces employees to support financially an organization with which they may disagree when it negotiates and administers a collective agreement *with their employer*. *See Ellis*, 466 U.S. at 455; *Abood*, 431 U.S. at 222, 257-58. Coerced subsidization of even non-unit bargaining adds substantially to that interference, because the labor relations of *other persons* "are matters of public concern," speech and association concerning which are fully protected by the first amendment. *Thornhill v. Alabama*, 310 U.S. 88, 102-05 (1940); *see DeBartolo Corp. v. Florida Gulf Coast Bldg. Trades Council*, 485 U.S. 568, 575-76 (1988). In the public sector, the added infringement is greater, because non-unit bargaining is *petitioning of government* on subjects other than *the objectors'* terms and conditions of employment.

Moreover, the "bargaining" activities in other units held chargeable here include organizing and litigation, in direct conflict with *Ellis*, 466 U.S. at 451-53. *See* P.A. 55a-57a, 80a; *supra* pp.

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in part, 466 U.S. 435 (1984). Thus, its convention, and its social activities, *Ellis*, 466 U.S. at 449-50, were directly related to representation of the objectors' unit, as well as other units with which it had the same relationship.

17-18 & note 9. Coerced subsidies of organizing and litigation not directly concerning the employees' bargaining unit compel association with other groups of workers for two additional forms of petition and speech that are fully protected by the first amendment. *See In re Primus*, 436 U.S. 412, 426-28 (1978) (litigation); *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (organizing). And, most importantly, the issue here is not just the chargeability of "bargaining" activities in other units, but also whether nonmembers must subsidize lobbying, ballot campaigns, and other ideological activities that involve their unit only indirectly or not at all. *See supra* pp. 17-18; *infra* pp. 25-39.

The district court sought to justify those serious added infringements on first-amendment freedoms by citing the fact that "unions operate on a cost-sharing basis." P.A. 56a. That, however, is a voluntary decision made by unions, not a circumstance compelled by the state, much less a vital state interest. Indeed, Michigan disavowed *any* interest in "cost sharing" by permitting the employees at each separate unit to choose their own, potentially competing, bargaining agent. *See* Mich. Comp. Laws § 423.211 (P.A. 93a).

The district court's argument that "cooperative cross-funding" enables a union to more "effectively represent" each bargaining unit, P.A. 56a, is essentially the "bargaining power" argument that *Ellis* rejected with regard to organizing and non-unit litigation. *See* 466 U.S. at 441, 451-53.[14] It also ignores the testimony of an expert on economics, Professor Steven Hanke of Johns Hopkins University,[15] that direct costing by bargaining unit is more consistent with economic theory and

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[14] Even that fallacious argument does not justify charging activities on behalf of retirees. By definition retirees are no longer employed in any bargaining unit, *see* J.A. 29, and the union is no longer their bargaining agent and owes them no statutory duty of fair representation. *See Allied Chem. Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 & n.20 (1971).

[15] For his professional qualifications, *see* J.A. 64-70, 251-56.

practice. According to Hanke, averaging increases the risk that nonmembers will be compelled to subsidize nonchargeable activities, and there is no economic evidence that bargaining in one unit necessarily beneficially affects others. J.A. 71-84.

The last point is confirmed by the unions' witnesses and by the MEA's structure. Union officials and the unions' expert witness on labor relations conceded that bargaining and sources of funding are unique at higher education institutions, such as Ferris. J.A. 55-56, 91, 93, 106. Higher education units had a separate coordinator providing specialized services, and a separate organization, because of their "unique needs and concerns." J.A. 88-93. Similarly, support personnel had a separate organization and different dues structure, because some bargaining issues were significantly different in their units. J.A. 86-87, 95-97.[16]

Not surprisingly then, the unions' expert testified that bargaining in one unit may or may not establish a "pattern" for bargaining in another, depending on geographic area, labor market, type and number of employees involved, and many other economic variables, including the state of the economy. He admitted that even among similar units, "pattern bargaining" does not always occur, that the factors which determine whether a "pattern" is set are "constantly changing," and that a "pattern" may be set where the bargaining agents in two units are not affiliated. J.A. 100-07; *see* J.A. 56-57, 98.

In sum, as with organizing other units and "litigation seeking to protect the rights of [represented] employees generally," *Ellis*, 466 U.S. at 451-53, the connection between bargaining in different units is too "attenuated" to justify cross-subsidization. Nothing in this Court's opinions suggests that costs may be taxed to unwilling nonmembers simply because union members in more than one unit choose to affiliate, or because an activity might possibly provide indirect economic "benefit." The only "benefits"

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16 The Michigan Employment Relations Commission generally required that teaching and support personnel be in separate units. J.A. 29.

which justify compulsory fees are those received by employees from the activities of their exclusive representative which statutorily must be performed on behalf of " 'all employees . . . , union and nonunion,' *within the relevant unit*," and which, therefore, presumptively provide "benefits of union representation that *necessarily* accrue to all employees." *Abood*, 431 U.S. at 221-22 (quoting *Street*, 367 U.S. at 761) (emphasis added).[17]

The district court also sought to excuse its failure to follow *Ellis* by asserting that it "would create an unreasonable and unmanageable administrative burden" if the unions had to allocate litigation (or other) expenses by unit. P.A. 57a. Although union witnesses complained that it would be difficult to record expenses on that basis, they typically cited services provided simultaneously to more than one unit, such as general research or training. *See, e.g.*, J.A. 42-43, 84-85. The pro rata costs of such services, if chargeable in nature, can easily be determined by dividing their total costs by the number of employees in all units which receive them.

Moreover, the union witnesses' self-interested speculation was belied when they were asked about services provided *directly* to a particular unit, such as litigation and the services of field personnel. The MEA's legal director testified that, in fact, its litigation expenses *were already kept by bargaining unit*, without burden. J.A. 23, 30-32. And, the NEA's accounting manager admitted that its accounting records broke expenses "down to place and to function," and that field personnel could designate

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17 No evidence supports the district court's speculation that in some years a pro rata share of chargeable services provided to a bargaining unit might exceed dues, even though by statute the service fee cannot. *See* P.A. 56a-57a. In any event, while that concern might be a ground, present under the RLA as well as the PERA, for asking the legislature to amend the statute to permit service fees to exceed dues in such years, it is no reason to invade the first-amendment rights of nonmembers by forcing them to pay for services not provided to their unit in other years., Certainly, this Court did not see it as such when it adopted the bargaining-unit test in *Ellis*.

the units served on the time sheets indicating daily activities already kept by all of the NEA's employees. J.A. 40-41, 45.

In any event, "administrative convenience alone is insufficient to make valid what otherwise is a violation of [individual constitutional rights]." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 646-47 (1974); *see Keller*, 110 S. Ct. at 2237; *Ellis*, 466 U.S. at 444. It "is not unduly burdensome" to require an organization receiving a governmental benefit, because it engages in a certain activity, to "keep records adequate to show" that contributions for that purpose are used for it. *Regan v. Taxation With Representation*, 461 U.S. 540, 544 n.6 (1983).

In the free market, no one who provides services would be in business long if he charged all customers the same "average" fee for different services. Attorneys, accountants, plumbers, TV-repairmen, and others have devised practical and fair methods of recording and valuing time and costs and allocating them among clients. That nonmembers are compulsory "customers" of unions' services does not entitle them to any less precise a computation of their specific "bill." Even administrative agencies charging "user fees" have been required "to identify the *specific* items of direct or indirect cost incurred in providing *each* service or benefit for which [they] see[k] to assess a fee, and then to divide that cost among the members of the *recipient* class." *National Cable Television Ass'n v. FCC*, 554 F.2d 1094, 1105 (D.C. Cir. 1976) (emphasis added); *see FPC v. New England Power Co.*, 415 U.S. 345, 349-51 (1974).[18] Because first-amendment rights are at stake, at least as much is required of unions which seek the privilege of coercing bargaining fees from employees.

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[18] Professor Hanke testified that this is the only economically rational method of calculating user fees and public utility rates; other methods are "highly politicized" and arbitrary. J.A. 72-76.

B. LOBBYING

The district court held that three expenditures for lobbying were chargeable. One was an expenditure by the FFA for a "Preserve Public Education (PPE) Conference," which the court considered chargeable because the MEA's PPE program included lobbying "directed at securing funding for public education in Michigan." P.A. 30a, 58a.[19] The second was the cost of 1,816 column inches of the 1,895.5 categorized as "Lobbying" in the *Teacher's Voice*, more than the MEA claimed to be chargeable. *Compare* P.A. 63a, 80a, *with* J.A. 204-17 (J.A. 24-26). The third was NEA Research program 2.5, which included preparation of testimony and reports on legislative activity on federal bills affecting retirement. P.A. 65a; J.A. 297-98 (J.A. 37-39).

None of those expenditures was shown to be for lobbying for ratification of, or authorization or appropriation of funds under, the collective agreement between Ferris and the FFA. There was no evidence that the PPE conference concerned lobbying for anything more specific than "to obtain funds for public education generally," as the court of appeals' majority put it. *See* P.A. 8a-9a, 30a-31a, 58a; J.A. 186-87 (J.A. 114, 116-17); 263-64, 269-70 (J.A. 27-28). The NEA's lobbying on federal retirement legislation obviously is not closely related to bargaining at Ferris. And, only a small portion of the *Teacher's Voice* articles in the "Lobbying" category—certainly much less than the 96% found chargeable by the district court—even concern lobbying for funding of higher education institutions generally or on legislation that otherwise directly affected employment conditions in higher education. In addition to appropriations for public education generally, the articles cover such subjects as taxes, statutory retirement benefits, proposed abolition of the U.S. Department of Education, tuition tax credits, and federal aid to students. J.A. 204-17 (J.A. 24-26), & Pl.Ex. 612 (J.A. 27-28) as referenced therein (*e.g.*, J.A. 256-58, 272-75).

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[19] In fact, that program was not just lobbying, and the unions conceded that the PPE conference was unrelated to collective bargaining. *See infra* p. 32.

The lack of a direct relationship between the unions' lobbying and bargaining at Ferris is to be expected. Most employees represented by the MEA are in K-12, not higher, education, J.A. 144 (J.A. 51-52), and the funding of higher education in Michigan is "substantially different" from that of K-12 schools, J.A. 35, 91, 93. For example, much of the lobbying reported in the *Teacher's Voice* was in opposition to legislative proposals to cut property taxes. *E.g.*, J.A. 256-58. The MEA's director of Government Affairs testified that those proposals would not have affected Ferris, because it derives no revenue from property taxes. J.A. 119-120, 122-23.

"[A]ttempts to influence the passage or enforcement of laws," including "publicity campaign[s] to influence governmental action," are "political activity" the protection of which is at the core of the first amendment. *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 135-41 (1961); *see Keller*, 110 S. Ct. at 2231 & n.2, 2233-34; *Street*, 367 U.S. at 777 (Douglas, J., concurring), 788-91 (Black, J., dissenting). Coerced subsidies for lobbying clearly constitute substantial interference with first-amendment rights beyond that inherent in support of a bargaining agent's "dealing with the employer on labor-management issues," *Ellis*, 466 U.S. at 448. It therefore can only be permitted if narrowly related to the state interest that supports a compulsory fee. *See Keller*, 110 S. Ct. at 2236-37.

Both courts below conceded that dissenting employees may not be charged for lobbying in the private sector. P.A. 7a, 51a-52a; *accord Beck v. Communications Workers*, 776 F.2d 1187, 1210-11 (1985), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd on other grounds*, 487 U.S. 735 (1988); *Ellis v. Railway Clerks*, 91 L.R.R.M. (BNA) 2339, 2342-43 (1976) (interlocutory summary judgment), *incorporated*, 108 L.R.R.M. 2648 (S.D. Cal. 1980), *aff'd in part, rev'd in part, on other grounds*, 685 F.2d 1065 (9th Cir. 1982), *aff'd in part, rev'd in part*, 466 U.S. 435 (1984). That was settled in *Street*, which, as described in *Ellis*, 466 U.S at 447 (emphasis added), held that objectors "could not be burdened with *any part* of the union's expenditures in support of political or ideological causes." *Street*, 367 U.S. at 768-69 & n.17 (quoting

Treas. Reg. § 1.162-14(c)(2)), specifically cited " 'expenditures for lobbying purposes, for the promotion or defeat of legislation, * * * or for carrying on propaganda * * * related to any of the foregoing purposes * * * ,' " as "political causes" for which objectors' funds may not be spent under the RLA.[20]

Despite *Street*, the panel majority and the district court held that "union lobbying to obtain funds for public education generally" or on measures that "otherwise directly impact on the terms and conditions of employment" of educational employees is chargeable, even if *un*related to the Ferris unit. They relied on the fact that *Abood* noted differences between collective bargaining in the public and private sectors. P.A. 7a-10a, 51a-54a, 58a. However, the courts' conclusion does not follow from and is, indeed, contrary to *Abood*. *See Beck*, 776 F.2d at 1211 n.31 (dictum).[21]

Abood, 431 U.S. at 232 (emphasis added), held that the "differences between public- and private-sector collective bargaining simply *do not translate into differences in First Amendment rights*." Michigan's authorization of the use of fees collected from objecting nonmembers for "political and ideological purposes unrelated to collective bargaining" was invalidated on first-amendment grounds in *Abood*, 431 U.S. at 232-36, precisely

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20 The separate opinions in *Street* agreed that the Court prohibited use of compulsory dues for legislative activities, whether on statutory or constitutional grounds. *See Street*, 367 U.S. at 777 (Douglas, J., concurring), 779 (Whittaker, J., concurring in part), 788-91 (Black, J., dissenting), 812-14 (Frankfurter, J., dissenting).

21 The panel majority also relied on *Knight v. Minnesota Community College Faculty Association*, 571 F. Supp. 1 (D. Minn. 1982) (3-judge court), *aff'd mem.*, 460 U.S. 1048 (1983). P.A. 7a. This Court's summary affirmance in *Knight* is not dispositive here, because *Knight*, 571 F. Supp. at 6, concerned only the constitutionality of public-sector exclusive representation; "[c]alculation of the fair share fee [wa]s not in dispute." *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-83 (1979); *Mandel v. Bradley*, 432 U.S. 173, 175-77 (1977).

because state law permits spending of those fees "for *legislative lobbying* and in support of political candidates," *id.* at 215, 232-33 & n.29 (emphasis added); *see Beck*, 776 F.2d at 1200, 1206.

Only in *dicta* did the Court speculate that a narrow class of lobbying might directly serve the only state interest that justifies the agency shop in the public sector: "The process of establishing *a written collective-bargaining agreement* * * * may require not merely concord at the bargaining table, but subsequent approval by other public authorities; *related* budgetary and appropriations decisions might be seen as an integral part of the bargaining process." *Id.* at 236 (emphasis added). Even there, as Judge Merritt explained, that "entire section from *Abood* makes clear that it is the relation of the challenged activity to the bargaining unit which is crucial." P.A. 13a (dissenting).

All that *Abood* intimated was that obtaining approval of a contract by a public body or official other than the government representatives who sit at the bargaining table is part of bargaining, and that contract administration includes lobbying the employees' public employer to budget and appropriate funds necessary to pay salaries and benefits set in the contract.[22] Here the *only* governmental body which ratifies and administers the contract with the FFA, and adopts and expends the budget of Ferris, is the Ferris Board of Control; the state and federal legislatures and other government agencies are not involved in those processes. Mich. Const. art. VIII, § 6; Mich. Comp. Laws §§ 390.802-.803 (1979); *see* J.A. 93-94, 125.

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[22] The Court probably had in mind circumstances under which the PERA requires "the employer" to execute an "ordinance or resolution incorporating [the] agreement reached" in negotiations, Mich. Comp. Laws § 423.215 (P.A. 93a-94a), or statutes covering state employees under which negotiated agreements and contract administration are directly subject to action by the legislature, *e.g.*, Minn. Stat. Ann. § 179A.22(4) (West Supp. 1990). The latter type of statute is another factor that distinguishes *Knight*, 571 F. Supp. at 3-4.

The panel majority and district court nonetheless considered lobbying and other political activities to obtain funding for education generally, or employment-related benefits not provided in the labor contract, as sufficiently "closely connected" to the duties of a bargaining agent representing educational employees to override the nonmembers' first-amendment rights. P.A. 7a-10a, 58a. That is untrue in fact and contrary to this Court's decisions.

The connection between state and federal funds and faculty salaries and benefits under the Ferris contract is only indirect and not even necessary. None of the state and federal monies Ferris receives are earmarked for salaries and benefits, which must be bargained with the Board of Control: state appropriations are general, and federal funds are either passed on as part of the state appropriations or are direct grants for particular programs. *See* J.A. 124-26.

Nor does any provision of the PERA impose a duty on an exclusive representative to advance employees' "interests in legislative and other 'political' arenas" outside its bargaining unit, as the panel majority erroneously assumed, P.A. 7a. *See* Mich. Comp. Laws §§ 423.201-.216; J.A. 24, 113-14; *see also Florey v. ALPA*, 439 F. Supp. 165, 169-70 (D. Minn. 1977) (a bargaining agent owes employees no duty to lobby an administrative agency on employment-related matters), *aff'd on other grounds*, 575 F.2d 673 (8th Cir. 1978). In those political arenas, the union acts as a voluntary association representing its members, not as a statutory bargaining agent speaking for all employees in the unit. As one MEA official described it, such lobbying is "typical of most common interest groups," and it was done by the NEA and its affiliates before public-sector bargaining became lawful. J.A. 47-48; 192-93 (J.A. 49-50).

The holding that the lobbying at issue here is sufficiently "closely connected" to employment relations to infringe on nonmembers' first-amendment rights is directly contrary to *Pickering v. Board of Education*, 391 U.S. 563 (1968). *Pickering* held that "the question whether a school system requires

additional funds" is not a matter of employer-employee relations, but a matter of public concern "in which the fact of employment *is only tangentially and insubstantially involved*." On such a question, "it is necessary to regard the teacher as the member of the general public he seeks to be," entitled to full first-amendment protection. *Id.* at 571-74 (emphasis added).[23]

The notion that the forum is irrelevant in determining the chargeability of lobbying, or other political activity, so long as its object impacts on the terms and conditions of employees represented by the union, *see* P.A. 7a, 52a, is contrary to *Madison Joint School District*. The Court there held that a nonunion teacher could not constitutionally be prohibited from speaking at a public school board meeting in opposition to an agency-shop proposal over which there was an impasse. The Court distinguished "true contract negotiations between a public body and its employees" from "participation in public discussion of public business." 429 U.S. at 175-76. Although the subject matter of the teacher's speech was an issue in bargaining, it also was "a debatable public question." *Id.* at 173-75 (citing *Pickering*, 391 U.S. at 568). Thus, the teacher had an "absolute right" to communicate his views on the agency-shop proposal either "when the board sits in public meetings to conduct public business and hear the views of citizens" or "to the public generally in pamphlets, letters, or expressions carried by the news media." *Id.* at 175-76 & n.10.

By the same token, the teacher in *Madison Joint School District* could not have been required to subsidize the union's

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[23] As noted *supra* pp. 25-26, many of the lobbying efforts of the unions here were for taxes, appropriations, and programs for K-12 education only, not even for higher education in general, much less Ferris in particular. Since K-12 and higher education are competitors for scarce public funds, the panel majority thus compels nonmembers to subsidize speech and petition on controversial matters of public concern that are not only against their interests as taxpayers, but also as faculty members. *See e.g.*, Samuelson, *Back-to-School Economics*, Newsweek, Sept. 23, 1985, at 53.

rebuttal of his views in either public forum. A nonmember may be required to subsidize his bargaining agent's conduct of negotiations with his employer on a term of employment, even if it has ideological implications. *Abood*, 431 U.S. at 222. However, he has an absolute right not to finance the union's lobbying of any governmental body when it "sits in public meetings to conduct public business and hear the views of citizens," or the union's communication of its "views to the public generally," on the same subject matter. In negotiating and administering labor contracts, a union is engaged in what Justice O'Connor has described as a "commercial" transaction. *Roberts*, 468 U.S. at 637-38 (concurring). But when it enters into legislative and other political arenas, it undertakes ideological activity that is not "an *integral* part *of the bargaining process*," *Abood*, 431 U.S. at 236 (emphasis added), even if the subject matter might impact on employees it represents for bargaining purposes.

As Justice Black said in *Street*, "[c]ompelling a man by law to pay his money to * * * advocate laws or doctrines he is against" violates the first amendment. It "makes no difference if, as is urged, political and legislative activities are helpful adjuncts of collective bargaining." 367 U.S. at 788-89 (dissenting on other grounds). State coerced financial support of such activity offends the first-amendment doubly. It harms both the individual's personal interest in free choice and society's interest in the free functioning of the political and legislative processes by increasing the clout of a special interest group on one side of some of the most controversial and fundamental public questions of our time, such as taxation, spending limits, allocation of public resources, educational philosophy, and the wisdom of authorizing public sector bargaining. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 785-86, 790-92 (1978); *Elrod*, 427 U.S. at 355-57.[24]

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[24] The dangers to society from state-coerced financial support of political and ideological activities of private organizations are described in Comment, *The Right of Ideological Nonassociation*, 66 Cal. L. Rev. 767, 786-88 (1978).

C. BALLOT CAMPAIGNS AND OTHER POLITICS

In approving the FFA's expenditure for a PPE conference on the theory that the PPE program was only a "lobbying" program, the district court ignored the very testimony that it credited as having "best summed up" that program: " 'The "Preserve Public Education Program" was an attempt on the part of the [MEA] to develop meaningful coalitions in the various communities so that we could *pass millages, fight ballot issues*, and do the kind of things that are absolutely necessary to fund public education * * * .' " P.A. 31a (quoting J.A. 34) (emphasis added). In short, the program involved campaigns for and against ballot issues as well as lobbying. Indeed, the MEA's outline of the PPE program and descriptions of it in the *Teacher's Voice*, also ignored by the court, show that it included political training, organizing, and electioneering in support of candidates for public office. J.A. 157-83 (J.A. 52-54); 264-69 (J.A. 27-28); *see also, e.g.*, J.A. 126-28 (PPE "integrate[d] with the political process"); 184-85 (J.A. 54-55) (memo *re* PPE-Posters & Ads).

Moreover, uncontradicted evidence establishes that the specific expense at issue was not chargeable under any theory. The unions stipulated that the FFA's expenditure for a PPE conference "was for travel expenses to the MEA legislative/political action conference held on February 4 through 6, 1982, at Flint, Michigan." J.A. 109. A memorandum announcing that conference and reports on it in the *Teacher's Voice* show that one of its major purposes was to begin the process of screening and endorsing candidates for public office. J.A. 186-87 (J.A. 114, 116-17); 263-64, 269-70 (J.A. 27-28). And, the MEA's director of Government Affairs testified that "[e]verything that related to this conference was non-chargeable"! J.A. 114-16.

The second expenditure for election-related activity held chargeable by the district court was the cost of 847.5 of the 1,167 column inches in the *Teacher's Voice* categorized as "Electoral Politics." P.A. 63a, 80a. As the court found more column inches chargeable than the MEA did, the articles considered chargeable by the court must include all articles which the MEA's legal

director deemed chargeable (*i.e.*, did not mark "NC" in the content analysis). Those articles concern millage elections, a petition drive for a statewide ballot proposition on utility rates, the MEA's opposition to a proposition for property-tax relief, school-board member recall elections, a referendum on an agency shop, the MEA convention's actions on political action committee contributions and a nuclear-weapons-freeze ballot proposal, plans to back candidates for the legislature, and the reasons for involvement in political action. J.A. 217-26 (J.A. 24-26), & Pl.Ex. 612 (J.A. 27-28) as referenced therein (*e.g.*, J.A 278).

Millages are local taxes for the support of public schools adopted in referenda of tax-paying voters in individual school districts. J.A. 121. Union witnesses admitted that millage "is not a union management issue. It is a school community issue * * * " in which the unions were involved before they were permitted to bargain. J.A. 49, 97-98; *see Pickering*, 391 U.S. at 566, 571-72. Like lobbying and campaigning for candidates, advocacy concerning referenda on questions affecting the general public, such as taxes, "is at the heart of the First Amendment's protection," even if the speaker is a corporation or union and the ballot proposition would have "a material effect on its business or property." *Bellotti*, 435 U.S. at 776-86.

Thus, coerced financial support of the MEA's campaigns for and against ballot propositions, including millages, substantially adds to the burden on first-amendment rights inherent in the agency shop, even if an objecting nonmember is employed in a school district that depends on millages. No vital state interest supports that infringement, because the PERA imposes no duty on an exclusive representative to engage in ballot campaigns.

Taxation is not a "budgetary [or] appropriations" decision that "might be seen as an integral part of the bargaining process," *Abood*, 431 U.S. at 236 (dictum). Like the election of "pro-labor political candidates," *Ellis*, 466 U.S. at 453, who then make those decisions, taxation relates only indirectly and contingently to bargaining. Millages need not be spent on teachers' salaries and benefits. J.A. 122. The contingency is tertiary in the case of

state taxes: *if* the voters pass a proposition increasing taxes, and *if* the legislature appropriates that money for education instead of other services, and *if* the employer agrees in later negotiations, then salaries may increase. *See* J.A. 120, 124.

Moreover, as clear as it is that no ballot propositions are within the scope of the statutory duties owed by unions to any employees they represent, it is even clearer that millages have no relationship at all to bargaining at Ferris. For neither it nor any other four-year higher education institution in Michigan derives *any* funding from millages. J.A. 112, 122. That fact alone requires reversal of the holdings below that the nonmembers can be charged for costs of the PPE program and the articles in the *Teacher's Voice* reporting on millage campaigns.

The panel majority conceded that "the district court may have erred in permitting plaintiffs to be charged for a few" other articles in the *Teacher's Voice*, such as those "on ballot propositions involving utility rates and a nuclear weapons freeze."[25] The majority analogized those expenditures to the *de minimis* expenditures for union social activities held chargeable in *Ellis*, 466 U.S. at 449-50. P.A. 10a n.1. The analogy fails.

First-amendment interests were implicated by the purely social activities in *Ellis*, 466 U.S. at 456, only "from the union's involvement" in them.[26] However, the political advocacy at

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25 The concession was unavoidable as to those and other articles. The unions stipulated that advocacy of the utility-rate proposition was nonchargeable, and a union official testified that activity in school-board elections (and thus recalls) also was nonchargeable. J.A. 117. The nonchargeability of the advocacy of an agency shop in a referendum was required by *Madison Joint School District*; and, of support of legislative candidates and a nuclear freeze ballot issue, by *Abood*. *See Keller*, 110 S. Ct. at 2237.

26 It does not follow from *Ellis* that all union "social" activities are constitutionally chargeable. Some may have ideological purposes. *E.g.*, J.A. 270-71 (J.A. 27-28) (banquet at legislative-political action conference, and fund-raiser for Michigan Women's Hall of Fame).

issue here implicates significant first-amendment interests far beyond the union's role as advocate, as Judge Merritt recognized. *See* P.A. 15a-16a (dissenting). Therefore, the panel majority's holding is contrary to the explicit command of *Hudson*, 475 U.S. at 305, that "whatever the amount, the quality of [nonmembers'] interest in not being compelled to subsidize the propagation of political and ideological views that they oppose is clear." The first amendment does not permit government to "forc[e] an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" *Id.* at 305-06 & n.15 (quoting 2 *The Writings of James Madison* 186 (G. Hunt ed. 1901), & I. Brant, *James Madison: The Nationalist* 354 (1948)).

D. PUBLIC RELATIONS ACTIVITIES

The district court held that $832.96 spent by the FFA "for informational picketing, media exposure, signs, posters, and buttons" during negotiations with Ferris in the fall of 1981 was chargeable. P.A. 30a, 59a.[27] In addition, the cost of the entire portion of the *Teacher's Voice* categorized as "Public Relations" was considered chargeable. P.A. 63a, 80a. Those articles concern efforts to improve the public image of the unions or of teachers and education generally. J.A. 227-29 (J.A. 24-26), & Pl.Ex. 612 (J.A. 27-28) as referenced therein (*e.g.*, J.A. 266-67).

The court of appeals' majority conceded that the "public relations activities challenged * * * in this case may not be 'central' to collective bargaining." P.A. 12a. They cannot be analogized to the *de minimis* social activities held chargeable in *Ellis*, 466 U.S. at 449-50, because public relations activities directed at the general public clearly add significantly to the infringement of the agency shop on objectors' first amendment interests. By definition they are not part of the statutory process of "dealing with the employer on labor-management issues," *Ellis*,

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27 Of that total, $425.56 was not more specifically identified, and $407.40 was included in a stipulation that certain expenses were characterized by the FFA's records as related to a threatened strike. J.A. 109-10; *see infra* p. 40.

466 U.S. at 448, but constitute public discussion of matters of public interest, even when the subject is public-sector labor negotiations. *See Madison Joint School Dist.*, 429 U.S. at 175-76 & n.10; J.A. 48; 192-93 (J.A. 49-50).

In *Beck*, 776 F.2d at 1211 n.32, it was held that creating a favorable climate of public sympathy and support for a union is "not 'reasonably necessary . . . for the proper effectuation' of collective bargaining." The district court here argued that "attempts to bring public pressure to bear on the employer" are "very important during contract negotiations involving public sector labor unions * * * given the nature of the employment and the funding available." P.A. 30a. In fact, public pressure was not *rationally* significant to the FFA's negotiations, because Ferris derives funds from tuition and legislative appropriations, not the local community. *See* J.A 112. Image-making efforts, whether particular or general, at best have only the same "attenuated connection with collective bargaining" as organizing, and it is equally "perverse" to charge nonmembers costs of attempts to improve the public image of unions which they oppose. *See Ellis*, 466 U.S. at 451-52 & n.13.

E. PROFESSIONAL ACTIVITIES

All but 319.5 column inches of the 1,977 categorized as "Other Material" in the *Teacher's Voice* were held chargeable by the district court. P.A. 63a, 80a. The articles in that category have no direct relationship to collective bargaining. They are about teaching and education generally, professional development, unemployment, job opportunities, award programs of the MEA, and other miscellaneous matters. J.A. 236-50 (J.A. 24-26), & Pl.Ex. 612 (J.A. 27-28) as referenced therein (*e.g.*, J.A. 271-72).

Activities concerning teaching and education as a profession were conducted by teacher associations before public-sector bargaining became lawful. J.A. 47-48; 192-93 (J.A. 49-50). As a matter of Michigan law, such activities do not "in any way relate to the representation of members in collective bargaining." *Grand Rapids School Bd.*, 64 L.R.R.M. (BNA) 1268, 1268-69

(Mich. Lab. Med. Bd. 1966). Laid-off employees are no longer in a bargaining unit, J.A. 85, and the union's duties as exclusive representative do not include helping them obtain unemployment benefits or new jobs. *See, e.g., Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819, 820-21 (9th Cir. 1985); *Lacy v. Auto Workers Local 287*, 102 L.R.R.M. (BNA) 2847, 2849-50 (S.D. Ind. 1979); *Marietta v. Cities Serv. Oil Co.*, 414 F. Supp. 1029, 1038 (D.N.J. 1976).

The panel majority conceded that these professional activities "may not be 'central' to collective bargaining." P.A. 12a. They, too, cannot be analogized to *de minimis* union social activities. Some of the unions' professional and educational programs are ideological in nature. Such things as curriculum and instructional methods are matters of public concern and, often, heated ideological controversy. *See Abood*, 431 U.S. at 256-57, 263 n.16 (Powell, J., concurring in the judgment). Moreover, even expression and association which can be described as social, economic, educational, cultural, charitable, or civic, rather than ideological, is worthy of full first-amendment protection. *Roberts*, 468 U.S. at 622, 626-27, 636; *Abood*, 431 U.S. at 231.[28] By the same token, objecting nonmembers cannot constitutionally be compelled to subsidize them. *See Beck*, 776 F.2d at 1211 (charitable expenditures not chargeable); *compare Street*, 367 U.S. at 777 n.3 (Douglas, J., concurring) *with Hanson*, 351 U.S. at 236 & n.8 (use of compulsory dues for "union insurance and death benefit plans" is not permitted by the first amendment).

F. PARTICIPATION IN AFFILIATES' MEETINGS

The district court ruled that the nonmembers could be charged for expenses of the FFA in sending delegates to conventions ("Representative Assemblies") of the MEA and NEA and participating in the 13E Coordinating Council. P.A. 57a-58a. In

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[28] In computing chargeable expenditures, the MEA conceded that its awards programs, reported on in some of the *Teacher's Voice* articles in this category, were nonchargeable. J.A. 21.

addition, it upheld the chargeability of expenses of the MEA in conducting its conventions and sending delegates to the NEA's. P.A. 62a-63a. Both lower courts considered it dispositive here that the national union's convention was held chargeable in *Ellis*. P.A. 5a-6a, 57a-58a. However, union activity which might normally be chargeable cannot be if "used as a cover for forcing ideological conformity." *Hanson*, 351 U.S. at 238.

The convention in *Ellis*, 466 U.S. at 448-49, met only once in four years to maintain the exclusive representative's "corporate or associational existence," "elect officers to manage and carry on its affairs," and "establish bargaining goals and priorities."[29] In addition, the costs of political activities that occurred at it apparently were "'deducted from [the dues of] objecting employees.'" *Id.* at 459 n.1 (Powell, J., dissenting in part) (quoting Brief for Respondents at 29 n.16, *Ellis* (No. 82-1150)).

It is a far cry from such a quadrennial business convention of the bargaining agent itself, *see supra* note 13, with only an incidental political component, to *three* conventions and several other meetings held *every* year by *affiliates* of the agent for *primarily* political and ideological purposes. The NEA, MEA, and 13E Coordinating Council are not the exclusive representative at Ferris. J.A. 23; 291 (J.A. 18-19). The fact that the Michigan Employment Relations Commission held that "the 'union as affiliated is the exclusive representative'" under the PERA, P.A. 6a, 58a (quoting *Bridgeport Spaulding Community Schools*, No. C79-J-353, slip op. at 40 (A.L.J. Feb. 24, 1986)), merely means that expenditures of the affiliates can be charged to dissenters if, *and only if*, it is proven that they were used for agreement-related purposes. *See Hudson*, 475 U.S. at 307 n.18; *Ellis*, 466 U.S. at 457 n.15. That burden of proof was not met as to the conventions of the MEA and NEA and activities of the 13E Coordinating Council.

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[29] The convention in *Ellis* not only set bargaining goals and priorities in pending negotiations, it ratified agreements. Brief for Respondents at 28-29, *Ellis* (No. 82-1150).

In 1981-82, the MEA held two conventions. The Fall Representative Assembly ("RA") adopted a platform, resolutions, and "Goals and Objectives." The Spring RA adopted a budget, amended the MEA's constitution and elected two members of the NEA board of directors. Officers of the MEA itself were not elected at either RA. The reports on those conventions in the *Teacher's Voice*, and the "Goals and Objectives" adopted at the Fall RA, show that much of the activity at them was political and ideological, and that they had little to do with bargaining anywhere and even less in higher education. *See* J.A. 141-54 (J.A. 51-52); 258-63, 275-83 (J.A. 27-28); *see also* J.A. 57 (the keynote address at the Fall 1981 RA was entitled "The Myths of the Arms Race").

The NEA's RA was even more remote from bargaining at Ferris. The goals of the MEA delegation to that convention included pursuit of the enactment of several federal legislative measures, including the Equal Rights Amendment, and support for the NEA's political action committee; *none* concerned bargaining. J.A. 154-56 (J.A. 58-59). That emphasis is not surprising, given that, as described in the *Teacher's Voice*, the main purpose of the NEA's convention was to generate and organize political and legislative opposition to the Reagan Administration and its programs. J.A. 283-89 (J.A. 27-28); *see also* Pl.Ex. 612 (J.A. 27-28), *Assault on Public Education a Major Concern*, Teacher's Voice, June 14, 1982, at 4, col. 1 (the NEA RA's theme was "Political Power for Educational Excellence").

The court of appeals accepted the district court's finding that the 13E Coordinating Council "developed bargaining strategies and representational policies for bargaining units, including Ferris State College." P.A. 6a, 58a. That finding conflicts with the only contemporaneous evidence of the Council's activities in 1981-82, which were primarily promoting lobbying for funding of education and encouraging contributions to the MEA and NEA political action committees. J.A. 131 (J.A. 59-60); 138-39 (J.A. 60); 140 (J.A. 61); *see* J.A. 60-61, 90; *see also* J.A. 47; 188-90 (J.A. 114, 116-17) (coordinating councils had political action committees).

G. PREPARATIONS FOR ILLEGAL STRIKES

Strikes by public employees are prohibited by the PERA. Mich. Comp. Laws § 423.202 (P.A. 92a); *see Abood*, 431 U.S. at 229. As a matter of Michigan law, compulsory service fees cannot include monies allocated to supporting public-sector strikes. *Male v. Grand Rapids Educ. Ass'n*, 98 Mich. App. 742, 295 N.W.2d 918 (1980), *appeal denied*, 412 Mich. 851 (1981). Although the district court followed *Male* to hold that a no-interest loan to support another local's strike was not chargeable, P.A. 59a-60a, it and the court of appeals' majority held that expenses of the FFA in preparing for and threatening an illegal strike were chargeable, because the union did not actually strike. P.A. 11a-12a, 59a.

The parties stipulated that "preparations for a possible strike were made in the fall of 1981 by the [FFA]"; that expenses totaling $4218.44, spent on a crisis center/strike headquarters, newspaper advertising, and signs, posters and buttons, were "variously characterized in the [FFA]'s records as 'strike' expenditures, 'job action' expenditures, and 'cris[i]s' expenditures",[30] and that $75.00 was spent for rent for a membership meeting "for the purpose of voting whether to accept the college's contract offer or support a strike." J.A. 109-10; *see* P.A. 78a-79a.[31]

The district court credited the testimony of a former MEA department head, employed at the time of trial by another part

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[30] The "term 'job action' is synonomous [*sic*] with 'strike'." P.A. 29a. The "purpose for which [a crisis center is] created and named" is, "if we ever have to have a strike, * * * to have a place for work to go on." J.A. 47.

[31] Half of the $75.00 in rent for that meeting should be considered strike-related, for a total of $4255.95 for strike preparations (the balance spent by the FFA on rent for membership meetings is not disputed). The $4804.00 in expenses related to "negotiations difficulties" held chargeable by the district court, P.A. 59a, included $4218.44 for strike preparations, $150.00 for meeting rent, and $425.56 in public relations activities not included in the stipulation concerning strike preparations, *see supra* p. 35 & note 27.

of the MEA organization, that the strike preparations were only a bargaining ploy to put pressure on Ferris. P.A. 29a-30a.[32] That self-serving testimony should have been disregarded, because it was contradicted by contemporaneous union records. *See Toledo Scale Corp. v. Westinghouse Elec. Corp.*, 351 F.2d 173, 179 (6th Cir. 1965); *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80-81 (2d Cir. 1949). Private communications among officials of the MEA and FFA in evidence show that the leaders of the FFA prepared and intended to strike, that a majority of its members voted to strike, and that a strike did not occur only because a majority vote of all faculty, not just members, was required by the FFA's bylaws. J.A. 132-35 (J.A. 63); 136-37 (J.A. 110); 290 (J.A. 88-89).[33]

In any event, nonmembers cannot constitutionally be compelled to finance threats to engage in an illegal activity, even as a pressure tactic in bargaining. As *Ellis*, 466 U.S. at 451, held, "[i]f the union cannot spend dissenters' funds for a particular activity, it has no justification for spending their funds for writing [or talking] about that activity." Judge Merritt correctly analyzed the implications of the decision below on this point: "If the strike had gone forward and the house of the college president had been put to the torch, obviously the dissenters could not be charged with the gasoline for the fire. Likewise, dissenters should not be forced to pay the expenses for planning unlawful acts." P.A. 16a (dissenting).

The Court can take judicial notice that illegal, even violent and criminal, acts sometimes occur, and more often are threat-

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[32] *See* J.A. 33-34, 61-63, for the witness' long history of employment by the MEA. His bias also is shown by his admission that he believed "that all MEA activities are really related to collective bargaining." J.A. 50-51.

[33] The FFA's President wrote to the MEA's President: "our intention is to take back to the membership the last drop we have been able to squeeze ou[t] of the College. Then we will send the mediator packing, set up one more bargaining date and call a strike next Tuesday." J.A. 136-37.

ened, in labor relations. *See, e.g.*, A. Thieblot & T. Haggard, *Union Violence: The Record and the Response by Courts, Legislatures, and the NLRB* (Labor Relations & Public Policy Series No. 25, 1983). However, that illegal acts are commonly planned and threatened as "bargaining tools" in legal negotiations gives government no compelling interest in requiring nonmembers to subsidize such conspiracies and extortionate speech. The state's only interest is in preventing subsidization, not in sanctioning it and thus encouraging the illegal activity. *See Male*, 98 Mich. App. at 750, 295 N.W.2d at 920. Therefore, to "permit a * * * union to force dissenters to finance [threats and preparation for] unlawful acts * * * is no small First Amendment violation." P.A. 16a-17a (Merritt, J., dissenting).

CONCLUSION

For the foregoing reasons, the judgment should be reversed to the extent that it entitles the unions to service fees for 1981-82 from petitioners for the disputed activities. All expenditures of the MEA and NEA that the court of appeals held chargeable fall into one or more of those categories. The only constitutionally chargeable costs that the district court identified are $4788.77 spent by the FFA for bargaining, contract ratification, a negotiations training workshop, and arbitration fees and $112.50 for its membership meetings. P.A. 57a; *supra* note 31. They constitute 34.9% of the FFA's total direct costs of $14,038.71; 34.9% of its administrative costs is $1500.18, giving total chargeable expenses of $6401.45. *See* P.A. 28a-29a, 78a-79a.

Dividing that total by the number of employees in the bargaining unit in 1981-82 (502), each employee's proportional share of proven chargeable costs is $12.75, not the $28.59 awarded by the district court, P.A. 78a. Thus, the Court should

reverse and remand with instructions to modify the judgment to provide that the FFA is entitled only to $12.75 from each of the five petitioners named in it in satisfaction of their service fee obligations for 1981-82, with any interest accrued on that amount in the escrow account, and that the balance in escrow be returned to those petitioners.

Respectfully submitted,

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